86-2059

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

SHERIFF, FALL RIVER COUNTY JAIL,
and
JEFF TARELL – JAILER OF FALL RIVER COUNTY JAIL,

Appellants,

v.

STANLEY L. HUGHES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a South Dakota tolling provision for imprisonment that expressly does not apply to federal civil rights cases, thus making those cases subject to the same three-year statute of limitations applicable to unincarcerated persons, violate the Equal Protection Clause?

2. Is a state statute that exempts federal civil rights cases from the tolling provisions for imprisonment inconsistent with federal law?

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 814 F.2d 532 and is reprinted in the Appendix at A-1 through A-7 . The opinion of the United States District Court for the District of South Dakota, Western Division, granting Appellants' motion for summary judgment is not reported. It is reprinted in the Appendix at A-8 through A-11 .

JURISDICTION

This action under 42 U.S.C. § 1983 draws into question the validity of S.D. Codified Laws § 15-2-22 (1984). The statute tolls statutes of limitations for persons imprisoned on a criminal charge or a sentence of less than life when a cause of action accrued but exempts federal civil rights cases from its application.

The United States District Court for the District of South Dakota, the Honorable Richard H. Battey presiding, assumed jurisdiction pursuant to 28 U.S.C. § 1343(3). On June 26, 1986, Judge Battey held that the provisions of S.D. Codified Laws § 15-2-22 applied to Appellee's action and, as a result, the action was barred by the statute of limitations. Judge Battey granted Appellants' motion for summary judgment and ordered Appellee's case dismissed. The order was entered on June 26, 1986.

Appellee filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit on July 28, 1986, invoking the court's jurisdiction under 28 U.S.C. § 1291. On March 24, 1987, the Court of Appeals rendered an opinion and entered judgment reversing the District Court. It held that the portion of S.D. Codified Laws § 15-2-22 exempting prisoner federal civil cases from its operation and effect was inconsistent with federal law and discriminated against federal rights. Notice of Appeal to this Court was filed June 8, 1987.

The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2).[1]

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[1]In the alternative, Appellants request the Supreme Court to entertain this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). *See Burger King Corp. v. Rudzewicz*, 417 U.S. 462 (1985).

Because the proceeding draws into question the constitutionality of a statute of the State of South Dakota, namely, S.D. Codified Laws § 15-2-22, and neither the State of South Dakota nor any agency, officer, or employee of the State of South Dakota is a party, it is noted that 28 U.S.C. §2403(b) may be applicable. This proceeding originated in a court of the United States as defined by 28 U.S.C. § 451, namely, the United States District Court for the District of South Dakota, and no court of the United States has certified to the Attorney General of the State of South Dakota the fact that the constitutionality of S.D. Codified Laws § 15-2-22 was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.

Section 15-2-22 of the South Dakota Codified Laws provides:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life;
>
> the time of such disability is not a part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.

The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action by advertisement.

The provisions of subdivision (3) do not apply to federal civil rights cases.

STATEMENT OF THE CASE

In late summer 1982, Stanley L. Hughes (hereafter "Plaintiff") was arrested and incarcerated in the Fall River County Jail, in Hot Springs, South Dakota. Plaintiff claims that he was raped by another prisoner at the jail on September 9, 10 and 11, 1982. Plaintiff claims that despite reporting the first and second alleged rapes to jailer Jeff Tarell, Tarell kept him in the same cell with the purported rapist. No alleged rapes occurred after those dates and Plaintiff had no other complaints about his treatment at the jail.

In the spring of 1983 Plaintiff was convicted on two counts of raping an eight-year-old boy. He began serving his sentence in the South Dakota State Penitentiary in April 1983. Plaintiff remains incarcerated in the Penitentiary.

On January 14, 1986, Plaintiff filed a *pro se* complaint in United States District Court for the District of South Dakota, Western Division. The complaint, based upon 42 U.S.C. § 1983, sought $5 million in damages, alleging Plaintiff became diseased with venereal warts as a result of the alleged rapes three and a half years prior. Tarell and the Sheriff of Fall River County were named as Defendants.

Plaintiff admits nothing prevented him from bringing his civil rights action earlier and that he could have brought it any time after September 1982. In fact, Plaintiff brought the action only after he learned the result of another civil rights lawsuit brought by a prison inmate against the South Dakota State Penitentiary.

South Dakota has a three-year statute of limitations for personal injury actions. S.D. Codified Laws § 15-2-14 (1984). When Plaintiff brought his action, South Dakota had a two-year statute of limitations for federal civil rights actions. S.D. Codified Laws § 15-2-15.2 (1984).[2] Another statute, S.D. Codified Laws § 15-2-22(3) (1984), tolls statutes of limitations for persons imprisoned on a criminal charge or a sentence of less than life. The statute does not apply to federal civil rights actions.

After taking Plaintiff's deposition, Defendants moved for a summary judgment on the basis that the action was barred by the statute of limitations. Plaintiff, represented by counsel appointed by the District Court, argued that the tolling provision of the S.D. Codified Laws § 15-2-22(3) applied, making his action timely. Plaintiff asserted that the exemption of federal civil rights cases from that portion of the tolling statute could not bar his action because it discriminates against civil rights claims and is inconsistent with federal policy.

The District Court held that the statute was not inconsistent with the federal Constitution or federal law. The Court applied the statute and granted summary judgment in Defendants' favor, holding the action was barred by South Dakota's three year personal injury statute of limitations.

On July 28, 1986, Plaintiff's counsel filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit.

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[2]Effective July 1, 1986, this statute was amended to create a three year limitations period for federal civil rights actions. 1986 S.D. Sess. Laws ch. 185, *codified at* S.D. Codified Laws § 15-2-15.2 (1987 Supp.). By its terms, the amendment was prospective only. That neither affects nor is an issue in this case. In light of *Wilson v. Garcia*, 471 U.S. 261 (1985), the District Court applied the personal injury statute of limitations, not the two-year statute then existing under S.D. Codified Laws § 15-2-15.2.

The issue posed in the Notice of Appeal and Statement of Issues was whether S.D. Codified Laws § 15-2-22 was inconsistent with federal policy. The Court of Appeals appointed the same counsel to represent Plaintiff and to brief the question of whether the civil rights exception of S.D. Codified Laws § 15-2-22 violated equal protection. In his appellate briefs, Plaintiff's counsel argued that South Dakota's tolling exception is inconsistent with federal law and policy and unconstitutionally discriminates against and is hostile to federal causes of action.

The Court of Appeals reversed the District Court. It said Plaintiff's action was tolled under S.D. Codified Laws § 15-2-22 because the civil rights provision discriminated against federal rights and thus was inconsistent with federal law. In so holding, the Court relied upon an earlier decision holding a state's shorter statute of limitations for federal statutory claims violative of the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment. *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946).[3]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Congress did not establish a statute of limitations or create tolling rules governing actions brought under 42 U.S.C. § 1983. Section 1988, however, directs that where no federal law exists

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[3]While the Court of Appeals did not expressly say that the civil rights provision of S.D. Codified Laws § 15-2-22 is unconstitutional, that is is the clear import of its citation of *Republic Pictures*. Moreover, it necessarily follows from the Court of Appeals' holding that the statute is invalid under either the Supremacy Clause or the Fourteenth Amendment, giving this Court jurisdiction on direct appeal. *Cf. Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 515 n. 7 (1984).

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause[.]

As a result, this Court has held that state personal injury statutes of limitations and tolling rules apply to Section 1983 actions. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Federal courts can disregard state tolling rules only if they are "inconsistent with the Constitution and laws of the United States." *Tomanio*, 446 U.S. at 483-85.

Statutes of limitations are not mere legal technicalities; they are a fundamental part of a well-ordered judicial system. *Id.* at 487. Tolling provisions are an integral part of and inextricably related to statutes of limitations. *Id.* at 485-86, 488; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975). Moreover, state policies or repose are not disfavored in federal law. *Id.* at 488. Thus, the question is not whether S.D. Codified Laws § 15-2-22 should be looked to; it is whether the statute is inconsistent with federal law or the Constitution.

The Equal Protection Clause is essentially a directive that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 215 (1982). The initial discretion to classify what is similar and what is different rests with the legislatures of the various States. *Id.* at 216. Absent a classification that is based upon a suspect class or impinges upon fundamental rights, the determination made by a state legislature and reflected in a state's statutes need only be rationally related to the achievement of legitimate governmental ends. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982).

This Court has never recognized prison inmates as a suspect class for Equal Protection analysis. Other courts have expressly said prison inmates are not a suspect class. *See, e.g., Graham v. Bowen*, 648 F. Supp. 298, 301 (S.D. Tex. 1986); *Jones v. Gruneward*, 644 F. Supp. 256, 259 (S.D. N.Y. 1986); *Jackson v.*

Congress of the United States, 558 F. Supp. 1288, 1291 (S.D.N.Y. 1983); *Hicks v. Commonwealth of Virginia*, 397 F. Supp. 401, 402 (W.D. Va. 1975). While prisoners do have a constitutional right of access to the courts, *see, e.g., Bounds v. Smith*, 430 U.S. 817 (1977), South Dakota has erected no barrier to the courts or to the filing of civil rights actions. To the contrary, S.D. Codified Laws § 15-2-22 places prisoner civil rights cases on a par with civil rights claims of ordinary unincarcerated citizens.

Thus, S.D. Codified Laws § 15-2-22 need only meet the rational basis test to survive Equal Protection scrutiny. The limitations period created in part by the statute is long enough to provide a reasonable opportunity for an incarcerated civil rights plaintiff to bring suit. This Court has approved three year statutes of limitations in civil rights actions, *Wilson v. Garcia, supra*, and 42 U.S.C. § 1986 provides a one year statute of limitations. If these limitations periods are permissible, the three year statute of limitations that applies to prisoners in South Dakota cannot violate the Equal Protection Clause.

Important government interests are at stake here. Public entities and state actors are the targets of federal civil rights claims. These individuals and entities are entitled to know at the end of a given period that their exposure and liability is over. Such a cutoff is important from a financial and planning standpoint so that individuals and entities like the sheriff, jailer and county here can adopt budgets and provide insurance for themselves and others to defend against such actions and to pay any awards.

Also, governmental immunity and notice of claim provisions may limit local government liability against state law claims. *See, e.g.*, S.D. Codified Laws § 7-18-6 (1981) (no action may be brought against a county unless the claim is first presented to and acted upon by the board of county commissioners); S.D. Codified Laws § 9-24-2 (1981) (no action for personal injury caused by the negligence of a municipality can be brought absent written notice

of the claim within sixty days after the injury).[4] These provisions, however, would not protect local government against a federal civil rights claim, where the prospect exists for an attorney fee award far in excess of any jury verdict. *See City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986) (upholding attorney fee award of $245,456.25 where jury verdict was $33,350.00).

Moreover, claims such as this one become stale over time. Memories fade, witnesses disappear, and records are lost or destroyed. It is these same policies which provide the rationale for statutes of limitations in the first instance. *See, e.g., Tomanio, supra*, 446 U.S. at 487. Additionally, as explored in detail in Part II, *infra*, the rationale behind prisoner tolling provisions does not comport with the realities of federal civil rights actions.

These policies and concerns constitute a rational basis for the South Dakota Legislature's decision not to provide a tolling provision for imprisonment in federal civil rights actions. Thus, excepting prisoner civil rights actions from the general tolling statute does not violate the Equal Protection Clause. *Cf. Hargett v. Limberg*, 598 F. Supp. 152, 156-58 (D. Utah 1984), *rev'd on other grounds*, 801 F.2d 368 (10th Cir. 1986) (statute excluding minors and incompetent persons with medical malpractice claims from general tolling provision does not violate the Equal Protection Clause).

Nor is S.D. Codified Laws § 15-2-22 inconsistent with federal law. This Court addressed the question of when state laws are inconsistent with federal law in *Robertson v. Wegmann*, 436 U.S. 584 (1978). The Court held that a Louisiana survivorship statute that limited the class of people for whose benefit an action sur-

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[4]These statutes were repealed in 1986 when the South Dakota Legislature created a public entity pool. 1986 S.D. Sess. Laws ch. 4, ch. 413. They were, however, in existence at the time Plaintiff's cause of action accrued. Moreover, even under the new statutory scheme no action can be brought against a public entity or its employees unless written notice of the injury is given with 180 days after the injury. S.D. Codified Laws § 3-21-2 (1987 Supp.).

vived, and which precluded recovery in that case, was not inconsistent with federal law. It said:

> That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1983 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

436 U.S. at 593.

Of prime importance in determining whether a state law is inconsistent with federal law is whether application of the law is inconsistent with the federal policies underlying the cause of action. *Id.* at 590 (quoting *Railway Express, supra,* 421 U.S. at 465). Deterrence and compensation are the policies underlying federal civil rights claims. *Id.* at 590-91. The civil rights provision of S.D. Codified Laws § 15-2-22 is not inconsistent with those policies.

Prisoners can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years. *Cf. Tomanio, supra,* 446 U.S. at 488. However, refusal to apply South Dakota's provision requiring prisoners to bring their claims within three years of accrual is inconsistent with the policy of deterrence. If an inmate's constitutional rights are violated while incarcerated, there is no deterrent effect in allowing the inmate to sleep on his case for up to eight years. Refusing to apply the provision also is inconsistent with the policy of attempting to limit the exposure of civil rights defendants to claims brought within a reasonable period of time. *See Id.* at 487.

Like the petitioner in *Railway Express*, Plaintiff freely concedes he could have filed his action at any time after his cause of action accrued. 421 U.S. at 466. As in *Railway Express*, Plaintiff slept on his rights and no policy reason exists to excuse his failure to take the steps necessary to present his claim. *Id.*

II.

This appeal also presents an important and substantial question of the extent to which states can modify their codification of common law principles to recognize and respond to the realities of modern society. The Court of Appeals gave short shrift to Defendants' position that the common law doctrines giving rise to prisoner tolling statutes simply do not fit the reality of federal civil rights litigation and the policies underlying it.

The rule tolling statutes of limitation for imprisoned persons stems from the common law concept that such persons are *civiliter mortuus* (civilly dead) and, hence, unable to sue. *See, e.g., Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985); *Heard v. Caldwell*, 364 F. Supp. 419, 421 (S.D. Ga. 1973). When prisoners were unable to sue, tolling provisions protected their ability to sue when the disability was removed.

The history of S.D. Codified Laws § 15-2-22 demonstrates it is a codification of common law doctrine. With the exception of the civil rights provision and another dealing with real estate foreclosures, the statute has existed with virtually the same language since before South Dakota became a state. *See* Revised Code of Civil Procedure of the Territory of Dakota § 64 (1877). When South Dakota achieved statehood, the statute became a state law without change. *See* 1890 S.D. Sess. Laws ch. 105; Revised Code of Civil Procedure of South Dakota § 70 (1903).

Today, however, the disability imagined and created by the common law no longer exists. Not only do prisoners have a constitutional right of access to the courts and a constitutional right to adequate legal assistance, including law libraries, they are entitled to have paper, pens, notarial services and even stamps provided to them to bring their actions. *See Bounds v. Smith*, 430 U.S. 817

(1977); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Similarly, prisoners can have counsel appointed to represent them in federal court. *See* 28 U.S.C. § 1915. Nothing prevents prisoners from bringing civil rights actions while incarcerated, as is demonstrated by the fact Plaintiff brought this action, along with a separate petition for a writ of habeas corpus, while in prison. Because all prisoners who suffer constitutional deprivations while incarcerated can, in fact, bring civil rights actions and the statutes at issue deals with actions accruing while in prison or jail, it is inconsistent for the statute of limitations to hinge on the premise that a prisoner is incapable of bringing the action. *Hawthorne*, *supra*, 761 F.2d at 1516.

In 1983, the South Dakota Legislature recognized that the common law underpinnings of the prisoner tolling provision did not comport with the reality of federal civil rights cases. It amended Section 15-2-22 to make the prisoner tolling provision inapplicable to those cases. 1983 S.D. Sess. Laws ch. 155, § 2. The Legislature made a judgment that prisoners' constitutionally guaranteed access to courts and right to legal assistance obliterated the purpose behind prisoner tolling statutes for federal civil rights actions. Recognizing that inmates stand in the same, if not a better, position than ordinary citizens with civil rights claims, the Legislature put those inmates on a par with ordinary citizens.

The civil rights provision of S.D. Codified Laws § 15-2-22 reflects a state legislative determination that the mere fact of incarceration does not disable a person from bringing and pursuing civil rights cases. This determination simply recognizes and responds to the facts of modern society. Moreover, it is the type of decision the States are expected to make in our federalist system. In the language of 42 U.S.C. § 1988, South Dakota has modified and changed the common law by statute. The decision of the Court of Appeals nullifies that determination and forbids the States from making such decisions simply because a federal cause of action forms the basis of a person's lawsuit. The Court of Appeals' decision does not foster federalism when it rejects a rule deliberately chosen by the South Dakota Legislature and supplants it with an *ad hoc* federal rule. *Cf. Tomanio*, *supra*, 466 U.S. at 492.

III.

Finally, since this Court's decision in *Tomanio*, *supra*, the federal courts are in conflict on the applicability of prisoner tolling provisions to federal civil rights actions. Thus, for example, Georgia's prisoner tolling statute applies to federal actions brought by state prisoners against state prison officials, *Turner v. Evans*, 721 F.2d 341 (11th Cir. 1983), but not to actions brought by federal prisoners against federal prison officials. *Hawthorne*, *supra*. Conflict even exists between judges within the same district. *See LaGon v. Barry*, 658 F. Supp. 55 (D.D.C. 1987).

Several courts have held that state prisoner tolling provisions apply to federal civil rights claims. *See, e.g., Marks v. Parra*, 785 F.2d 1419 (9th Cir. 1986); *Bailey v. Faulkner*, 765 F.2d 102 (7th Cir. 1985); *Williams v. Dallas County Commissioners*, 689 F.2d 1212 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983); *Brown v. Bigger*, 622 F.2d 1025 (10th Cir. 1980). Others have held that such statutes are inconsistent with the policies underlying federal civil rights claims. *See, e.g., Hawthorne*, *supra*, (actions by federal prisoners against federal prison officials); *Perotti v. Carty*, 647 F. Supp. 39 (W.D. Ohio 1986); *Vargas v. Jago*, 636 F. Supp. 425 (S.D. Ohio 1986); *Campbell v. Guy*, 520 F. Supp. 53 (E.D. Mich. 1981), *aff'd without opinion*, 711 F.2d 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984).

This Court has recognized that conflict, confusion and uncertainty surrounding statute of limitations questions in civil rights litigation provide compelling reasons for review by the Supreme Court. *Wilson v. Garcia*, *supra*, 471 U.S. 261. Tolling provisions are an integral part of statutes of limitations. The disagreement among the federal courts over the applicability of prisoner tolling statutes breeds conflict, uncertainty and confusion. As a result, this case provides the Court with the opportunity to resolve the substantial question of whether common law-based prisoner tolling rules comport with the modern realities of civil rights litigation and to resolve a continuing and growing conflict among the federal courts.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by this Court for their resolution.

Respectfully submitted,

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June 22, 1987

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5296

Stanley L. Hughes,

Appellant,

v.

Sheriff of Fall River County Jail
and Jeff Tarell, Jailer Fall River County Jail

Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA.

Submitted: March 11, 1987
Filed: March 24, 1987

Before ARNOLD and FAGG, Circuit Judges,
and LARSON,* Senior District Judge.

ARNOLD, Circuit Judge.

Plaintiff Stanley L. Hughes, a South Dakota State Penitentiary inmate, appeals the District Court's grant of summary judgment to the defendants in this action under 42 U.S.C. § 1983, the Sheriff of Fall River County Jail, and Jeff Tarell, Jailer of the Fall River County Jail. The District Court held that Hughes's action was barred by the applicable statute of limitations. Hughes contends that he is entitled to the benefit of a

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*The Hon. Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation

South Dakota tolling statute, S.D.C.L. 15-2-22(3), which, with certain restrictions, exempts periods of imprisonment from the time limited for commencing an action. Hughes maintains that the District Court erred in applying a provision of this statute which states that it is inapplicable to federal civil-rights claims, arguing that this provision is inconsistent with federal law. We agree, and therefore reverse.

I.

Hughes was arrested for the crimes for which he is presently imprisoned late in the summer of 1982, and was incarcerated in the Fall River County Jail. Hughes alleges that he was raped by his cellmate in the jail on three successive days, September 9, 10, and 11, 1982. Hughes further alleges that he informed the jailer of the rapes upon each occurrence. The jailer, however, refused to move Hughes or otherwise provide adequate protection for Hughes from his cellmate's attacks, according to the complaint.

Hughes commenced this action in January 1986, over three years after the rapes. The defendants moved for summary judgment on statute-of-limitations grounds, arguing that either S.D.C.L. §15-2-15.2, which purports to establish a two-year statute of limitations for claims under the federal civil-rights statutes, or S.D.C.L. §15-2-14, which establishes a three-year limitations period for personal-injury claims, applied and barred the suit.[1] The District Court, noting that *Wilson v. Garcia*, 471 U.S. 261 (1985), establishes that the statute of limitations for §1983 actions is the state statute of limitations for personal-injury actions, ruled that the three-year statute applied, and that Hughes's action was barred unless the running of this statute had been tolled.

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[1] Effective July 1, 1986, S.D.C.L. §15-2-15.2 was amended to provide a three-year period for federal civil-rights actions, the same period that governs personal-injury actions under §15-2-14. However, this amendment was, by its terms, only prospective, and so has no application to Hughes's claim.

Hughes asserted that his imprisonment had tolled the running of the statute by virtue of S.D.C.L. §15-2-22(3). This statute provides that if a person entitled to bring an action is, at the time the cause of action accrues, imprisoned on a criminal charge or in execution of a sentence of a criminal court for a term less than life, the period of this disability is not part of the time limited for commencing the action, except that the period cannot be extended more than five years in all, or longer than one year after the disability ceases. Section 15-2-22 further provides, however, that the provisions of subdivision 15-2-22(3) "do not apply to federal civil rights cases."[2] Hughes maintained that this exclusion of federal civil-rights claims was not consistent with federal law, and therefore should not be applied to prevent tolling of the statute of limitations on his claim. The District Court disagreed, applied the state rule excluding federal civil-rights claims from the effect of its tolling statute, and held Hughes's action barred by the statute of limitations.

---

[2]S.D.C.L. §15-2-22 states in full:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture or against a Sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in Chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in the execution of a sentence of a criminal court for a term less than his natural life; the time of such disability is not part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.
>
> The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action or by advertisement.
>
> The provisions of subdivision (3) do not apply to federal civil rights cases.

II.

Congress did not establish any specific statute of limitations or body of tolling rules for actions brought under the Reconstruction Civil Rights Acts. In such circumstances, "the settled practice has been to adopt a local time limitation as federal law *if it is not inconsistent with federal law or policy to do so.*" *Wilson*, 471 U.S. at 266-67 (emphasis added); see *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). Congress has endorsed this practice for claims under the Reconstruction Civil Rights Acts, providing in 42 U.S.C. §1988 that where no suitable federal rule exists, rules of decision for such claims should be derived by incorporating the law of the forum state, "so far as [the state's law] is not inconsistent with the Constitution and laws of the United States." See *Wilson*, 471 U.S. at 267; *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). State statutes of limitations and tolling laws are inconsistent with federal law, and therefore not properly borrowed to govern federal claims, if they are inconsistent with the policies underlying the federal cause of action at issue, *Burnett*, 468 U.S. at 52-55; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975), or, more important in the present case, if they express hostility towards or discriminate against federal rights. *Wilson*, 471 U.S. at 276; *Johnson v. Davis*, 582 F.2d 1316, 1318-19 (4th Cir. 1978).

Thus, in *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946), a case brought under the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, this Court refused to apply an Iowa statute that prescribed a six-month statute of limitations for federal statutory claims, while a five- or ten-year limitations period governed analogous contract claims under Iowa law. We stated:

> A state may not discriminate against rights accruing under federal laws. *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230 [(1934)]; *Pufahl v. Estate of Parks*, 299 U.S. 217 [(1936)] . . . .

> . . . [Plaintiff's] claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment . . . in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme . . . .
>
> Here, the state has singled out federal claims ... as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violated Article 6 of the Constitution ... [and] would result in denying to those seeking to assert such claims, the equal protection of the law. 14th Amendment, Constitution, Sec. 1 . . . . (citations omitted).

151 F.2d at 546-47.[3]

S.D.C.L. §15-2-22 works a similar discrimination against federal rights. Had Hughes brought suit under South Dakota tort law for precisely the same occurrences and actions that are the subject of his 42 U.S.C. §1983 claim, he would have had the benefit of the tolling effects of §15-2-22. However, solely because he has sued under a federal civil-rights statute, §15-2-22 would not toll the statute on Hughes's action. South Dakota has singled out federal claims, subjecting them to more restrictive tolling provisions than those governing analogous state-law claims. Section 15-2-22's exclusion of federal civil-rights claims from the tolling effects of §15-2-22(3) is thus inconsistent with federal law, and should not be incorporated to govern federal civil-rights claims.

Chambers v. Omaha Public School District, 536 F.2d 222, 228 (8th Cir. 1976), cited by the defendants, is not contrary to our decision here. *Chambers* involved racial discrimination and First

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[3] The Supreme Court's per curiam affirmance simply cites to certain pages of three earlier cases. 327 U.S. 757, citing *McKnett*, 292 U.S. at 234; *Pufahl*, 299 U.S. at 227; and *Miles v. Illinois C.R. Co.*, 315 U.S. 698, 704 (1942). The content of the passages cited makes clear the Supreme Court's approval of our anti-discrimination rationale. *Matthewman v. Akahane*, 574 F. Supp. 1510, 1518-19 (D. Haw. 1983).

Amendment claims under 42 U.S.C. §1983. In *Chambers*, which was decided some years before the Supreme Court made clear in *Wilson* that, generally, all §1983 actions were to be governed by state statutes of limitations for personal-injury claims, we found no Nebraska causes of action that were analogous to the claims at issue, and therefore approved the application of a Nebraska statute that provided for a three-year statute of limitations for federal statutory claims. In so holding we expressly noted that since the plaintiffs had identified no analogous state-law claims, necessarily no analogous state claims had been given preferential treatment. 536 F.2d at 228-30. See *Mattheuman v. Akahane*, 574 F. Supp. at 1520-21 & n.20. Here, in contrast, South Dakota has clearly given preferential treatment to analogous state-law claims.

The defendants point out that the rule tolling the statute of limitations during imprisonment stems from the common-law doctrine that a prisoner is *civiliter mortuus* (civilly dead) and therefore unable to sue. See *Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985). The defendants further observe that this common-law doctrine no longer holds sway, and that prisoners may and frequently do sue. They conclude that it is therefore not necessary that there be any tolling provision for imprisonment. However, this does not rectify the shortcomings of S.D.C.L. §15-2-22. That it is permissible for there to be no tolling provision does not mean that a state may provide tolling for state claims but refuse to do so for analogous federal claims and have this discrimination against federal claims incorporated as federal law.

The defendants also point out that the Court in *Hawthorne*, *supra*, refused to incorporate a Georgia tolling provision for imprisonment to govern federal civil-rights claims because it was inconsistent with federal policies. 761 F.2d at 1517. See also *Campbell v. Guy*, 520 F. Supp. 53 (E.D. Mich. 1981), *aff'd*, 771 F.2d 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984). The tolling provisions in *Hawthorne* and *Campbell* would have tolled the statute of limitations for the entire duration of the prisoner's incarceration, a period that could be measured in decades. The

courts concluded that, at least where prisoners were not actually disabled from bringing lawsuits, tolling statutes that permit claims to lie dormant for such long periods are inconsistent with federal policies of repose, see *Tomanio*, 446 U.S. at 488; *Wilson*, 471 U.S. at 271, and with policies of deterrence underlying federal civil rights laws. *Hawthorne*, 761 F.2d at 1717; *Campbell*, 520 F. Supp. at 55-56. The South Dakota tolling provision, however, avoids this problem by limiting the total tolling period to a maximum of five years; thus, a §1983 claim would in any case have to be brought within eight years of accrual, and this period is not so long as to render the provision inconsistent with federal policies of repose.

The defendants have also made a number of other arguments, none of which we consider substantial. We express our gratitude to appellant's court-appointed counsel for his services.

III.

We therefore conclude that Hughes was entitled to have the statute of limitations on his claim tolled under S.D.C.L. §15-2-22, and reverse the District Court's grant of summary judgment to the defendants. The case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED
June 26, 1986
WILLIAM F. CLAYTON, clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV. 86-5021

STANLEY HUGHES,

Plaintiff,

vs.

SHERIFF FALL RIVER COUNTY JAIL
and JEFF TARELL - JAILER FALL RIVER COUNTY JAIL

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff commenced this action in January 1986 alleging violations of his civil rights under 42 U.S.C. § 1983. The substance of Plaintiff's allegations are that he was raped by his cellmate while a prisoner at the Fall River County Jail on September 9, 10, and 11, 1982. Plaintiff claims that he informed the jailer of the circumstances of the rapes upon each occurrence, but the jailer refused to believe Plaintiff and provide adequate protection for him from the attacks of his cellmate. Plaintiff further alleges that the jailer continued to incarcerate him in the same cell with the rapist despite Plaintiff's pleas to be moved. Plaintiff claims that as a result of the attacks he became diseased with venereal warts and has been permanently damaged in the amount of $5 million.

Defendants have moved for summary judgment on the sole issue of the statute of limitations. For the reasons stated herein, Defendants' Motion for Summary Judgment is granted.

Defendants urge the Court to apply either of two statutes of limitations to bar Plaintiff's case. The first, SDCL 15-2-15.2, reads as follows:

> An action brought under the federal civil rights statutes may be commenced only within two years after the alleged constitutional deprivation has occurred. This section is prospective in application.

The second statute of limitations urged by Defendants is SDCL 15-2-14, which provides that an action for personal injury must be brought within three years after the cause of action arose.

> Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within three years after the cause of action shall have accrued: ...
>
> (3) an action for personal injury.

The United States Supreme Court has decreed that the applicable statute of limitations in § 1983 actions is the analogous state statute of limitations for personal injury actions. *See Wilson v. Garcia*, ____ U.S. ____, 105 S. Ct. 1938, ___ L. Ed. 2d ____ (1985). Application of the three-year personal injury statute of limitations to Plaintiff's case renders his action time-barred unless the running of the statute of limitations has been tolled.

Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, ____, 100 S. Ct. 1790, 1795, 64 L. Ed. 2d 440, __ (1980). In 42 U.S.C. § 1988, Congress quite clearly instructs federal courts to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983. *Id.* at 1795. Because there is no relevant federal rule for tolling of the running of the statute of limitations, this Court should "borrow" the applicable state law tolling provision unless it is incon-

sistent with the Constitution and laws of the United States. *Id.* The length of the limitations period, and the closely related questions of tolling and application are to be governed by state law. *Wilson v. Garcia*, *supra* at 1943.

The relevant tolling statute in South Dakota is SDCL 15-2-22(3). It provides that if a person entitled to bring an action be at the time the cause of action accrued imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life; the term of such disability is not a part of the time limited for the commencement of the action. SDCL 15-2-22 further provides that the provisions of subdivision (3) do not apply to federal civil rights cases. Thus under the state law tolling provision applicable to this federal civil rights case, the running of the statute of limitations is not tolled and Plaintiff's action is time-barred by virtue of the running of the statute of limitations.

Plaintiff argues that the Court should not apply the South Dakota tolling provisions in SDCL 15-2-22 because the statute is inconsistent with federal law in that the statute discriminates between civil rights claims and all other claims (such as negligence) by prohibiting application of the tolling provision to civil rights claims. The Court finds no inconsistency between the South Dakota tolling provision and the United States Constitution and laws. In determining whether state law was inconsistent with federal law, the United States Supreme Court stated in *Robertson v. Wegemann*, 436 U.S. 584, 593, 98 S. Ct. 1991, 1996-97 (1978):

> The state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But §1988 quite clearly instructs us to refer to

> state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

SDCL 15-2-22 is not inconsistent with the laws of the United States when there is no federal provision for tolling of the statute of limitations with which SDCL 15-2-22 could be inconsistent.

In conclusion, the Court is bound to apply state rules for tolling of the statute of limitations in § 1983 actions unless the state rule is inconsistent with the Constitution and laws of the United States. The Court finds no inconsistency between the statute of limitations and tolling provisions of state law and applies the same to the instant action. Plaintiff's action was commenced after the applicable statute of limitations had run and no tolling provision saves the action. No issues of material fact remain and Defendants are entitled to judgment as a matter of law. This opinion constitutes the Court's findings of fact and conclusions of law. Based upon the foregoing, it is therefore

ORDERED that Defendants' Motion for Summary Judgment is granted and the case is dismissed.

Dated this 26th day of June, 1986.

BY THE COURT:

/s/ RICHARD H. BATTEY

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, Clerk

By /s/ ALICE R. RAESLY
Deputy

(SEAL)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-5296SD

STANLEY L. HUGHES,

Appellant,

v.

SHERIFF OF FALL RIVER COUNTY JAIL, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is reversed and remanded for further proceedings consistent with the opinion of this Court.

March 24, 1987

A true copy:
ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.

MANDATE ISSUED: APRIL 15, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STANLEY L. HUGHES,
Plaintiff and Appellant,

v.

SHERIFF, FALL RIVER COUNTY JAIL and
JEFF TARELL - JAILER OF FALL RIVER COUNTY JAIL,
Defendants and Appellees.

No. 86-5296-SD

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Sheriff, Fall River County Jail and Jeff Tarell - Jailer of Fall River County Jail, the Appellees above named, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Eighth Circuit dated March 24, 1987, reversing the summary judgment for Appellees entered by the United States District Court for the District of South Dakota on June 26, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 8th day of June, 1987.

DAVENPORT, EVANS, HURWITZ & SMITH

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Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-2059

In The

Supreme Court of the United States

October Term, 1986

SHERIFF, FALL RIVER COUNTY JAIL, and JEFF TARELL — JAILER OF FALL RIVER COUNTY JAIL,

Appellants,

v.

STANLEY L. HUGHES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS APPEAL

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NO. 86-2059

In The

Supreme Court of the United States

October Term, 1986

SHERIFF, FALL RIVER COUNTY JAIL, and JEFF TARELL — JAILER OF FALL RIVER COUNTY JAIL,

Appellants,

v.

STANLEY L. HUGHES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS APPEAL

For the sake of brevity Appellee incorporates by reference Appellants' Opinions Below, Jurisdiction, Constitutional and Statutory provisions, Statement of the Case and Appendix.

THE APPEAL SHOULD BE DISMISSED

Pursuant to United States Supreme Court Rule 16.1(d) Appellee moves to dismiss this appeal inasmuch as it deals with a statute unique to South Dakota thus it does not afford this Court with an opportunity to resolve a conflict among federal courts over this particular statute. South Dakota Codified Law 15-2-22 provides that:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in Chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life; the time of such disability is not a part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.
>
> The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action or by advertisement.
>
> The provisions of subdivision (3) do not apply to federal civil rights cases.

SDCL 15-2-22 is unique in that despite its availability to individuals incarcerated for a term less than life if they

being a personal injury action the legislature has specifically forbidden its application if the same individuals bring a 28 U.S.C.S. § 1983 cause of action even though the facts to be proven and the witnesses to be called are the same in each case.

This is not the appropriate case or time to decide whether the fifty states' tolling provisions for incarcerated individuals are archaic and should be abolished. Nor is it an appropriate time to determine whether Mr. Hughes was disabled under South Dakota's statutory scheme as he clearly fits into SDCL 15-2-22(3). Rather, this Court should, as the United States Court of Appeals for the Eighth Circuit did, limit its inquiry to whether SDCL 15-2-22 discriminated against federal rights actions and was inconsistent with federal law. This is the sole issue before this Court and it is respectfully argued that this Court should not expand its inquiry into areas that were not and need not be decided. SDCL 15-2-22 is on its face blatantly hostile to federal civil rights actions and is therefore inconsistent with federal law thereby warranting dismissal of this appeal.

Appellants cite to *Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985); *Perotti v. Carty*, 647 F.Supp. 39 (W.D. Ohio 1986); *Vargas v. Jago*, 636 F.Supp. 425 (S.D. Ohio 1986); *Campbell v. Guy*, 520 F.Supp. 53 (E.D. Mich. 1981), aff'd without opinion, 711 F.2d 1055 (6th Cir. 1983), cert. denied, 464 U.S. 1051 (1984), in support of their contention that there is conflict among federal courts in the application of prisoner tolling provisions to federal civil rights actions. None of the cases cited involved a statute which excluded § 1983 actions from the respective state's

tolling provisions as South Dakota's does. It appears that the *Perotti* and *Vargas* decisions held that incarceration in and of itself under Ohio's statutory scheme is not a disability when suing state officials thus its tolling provisions could not be invoked for § 1983 actions.

The *Perotti* Court relied heavily on the *Vargas* decision. *Perotti v. Carty,* 647 F.Supp. 39, 40 (W.D. Ohio 1986). The *Vargas* Court examined Ohio's statutory scheme, particularly Ohio Rev. Code §§ 2743.01 - .73 which provided:

> Civil actions against the state permitted by . . . shall be commenced no later than two years after the date of the accrual of the cause of action. . . . The period of limitations shall be tolled pursuant to section 2305.16 of the Revised Code, except there shall be no tolling during imprisonment unless the imprisoned person is of unsound mind. Ohio Rev. Code § 2743.16 (emphasis added).

> Section 2743.16 is of recent vintage and makes clear, we think, that the General Assembly does not consider imprisonment per se to be a disability in all cases. And, in a broad sense, suits filed against the state in the Court of Claims are of a similar ilk to suits filed against state officers under Section 1983 in the federal courts. Thus we conclude, for purposes of Section 1983 suits brought by prisoner over the condition(s) of their confinement, that the fact of incarceration, in and of itself, is not enough to toll the relevant statute of limitations. *Vargas v. Jago,* 636 F.Supp. 425, 429 (S.D. Ohio 1986).

Arguably, Ohio's tolling provisions are unavailable for either personal injury actions or § 1983 actions against state officials when incarceration is alleged to be the sole disability. South Dakota's statute is distinguishable from

Ohio's cases and statutory scheme inasmuch as South Dakota requires a prisoner to only show incarceration for a term less than life to be deemed disabled for purposes of its tolling statutes. Additionally, only § 1983 are precluded from its tolling statutes thus a South Dakota prisoner, unlike an Ohio prisoner, is deemed disabled for purposes of bringing a personal injury action but not for § 1983 actions. Lastly, the Ohio cases and the *Hawthorne* decision are distinguishable because those statutes provided that a case is tolled until an individual's sentence is completed. Thus a person incarcerated for thirty-five years could toll a statute for as many years whereas South Dakota requires that " . . . the period within which the action must be brought cannot be extended more than five years by any such disability (imprisonment) except infancy." SDCL 15-2-22.

Appellees' argue that excluding § 1983 actions from its tolling provision has a rational basis as public entities and state actors are entitled to know at the end of a given period that their exposure and liability is over. That a cutoff is important so that those individuals and entities can adopt budgets. Additionally, that claims become stale over time, memories fade, witnesses disappear and records are lost or destroyed. These arguments fail as one must, in any event, bring Appellee's actions within eight (8) years. SDCL 15-2-22. There is "no rational basis for distinguishing between § 1983 actions and actions for injury to the person in light of the purposes for which statute of limitations are generally prescribed . . . (inasmuch as) . . . the facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for § 1983 actions as for state actions brought to com-

pensate for the personal injury underlying the deprivation of federal constitutional rights." *Johnson v. Davis,* 582 F.2d 1316, 1319 (4th Cir. 1978). If Mr. Hughes was to bring a personal injury action to compensate for the personal injury underlying the deprivation of his constitutional rights he would have eight (8) years to bring his lawsuit as that is all he is afforded under the State's personal injury tolling provisions. Here, he brought the lawsuit within three and one-half years of the alleged injury and was well within the time the legislature has previously deemed a reasonable period to bring an action to address personal injuries at the state court level. Under South Dakota's current statutory scheme a mentally ill individual, whether incarcerated for a term less than life or not, who alleges that he was raped would have eight (8) years to bring his lawsuit whether it was a personal injury or § 1983 cause of action. SDCL 15-2-22. Arguably, the same testimony that would have to be presented in the incarcerated mentally ill person's personal injury lawsuit as would have to be presented in Mr. Hughes' § 1983 lawsuit. Thus, precluding Mr. Hughes lawsuit while allowing a prisoner, a mentally ill person or an incarcerated mentally ill person to bring a state claim for personal injury and § 1983 claim under the latter of the two when, in essence, the same parties and testimony will be involved does not promote intrastate uniformity, evidences blatant hostility toward § 1983 claims, has no rational basis and is clearly inconsistent with federal policy.

Prior to 1986 South Dakota provided that any action brought under the Federal Civil Rights statutes must be commenced within two years after the alleged constitutional deprivation even though it had a three year negli-

gence statute of limitations. This Court held in *Wilson v. Garcia,* 471 U.S. 261, 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985) that § 1983 claims are best categorized as personal injury actions for statute of limitation purposes. Thus, in 1986 the South Dakota legislature amended its special civil rights statute so that one had three years in which to bring on an action for a civil rights violation which is the same limitation period for personal injury actions. Despite a civil rights cause of action now being afforded the same limitation period as a personal injury cause of action the legislature failed to amend its tolling provisions so that a civil rights cause would be afforded the same tolling provisions as a personal injury cause of action.

The issue is whether SDCL 15-2-22 is inconsistent with federal policy when it excludes individuals incarcerated for a term less than life from South Dakota's tolling provisions merely because they bring a § 1983 action. "Because there is no federal statute of limitations applicable to suits alleging violations of civil rights, the court must apply the most appropriate state statute of limitation." *Cross v. General Motors Corporation,* 778 F.2d 468, 469 (8th Cir. 1985). 42 U.S.C.S. § 1983 claims are best categorized as personal injury actions for statute of limitation purposes. *Wilson v. Garcia,* 471 U.S. 261 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985).

"When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Id.* at 260. "This requirement emphasizes the predominance of the federal interest in the borrowing process, taken as a whole." *Id.* at 262. Additionally, this Court expressly rejected the notion that one is to look to particular facts or

the precise legal theory because counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Arguably this Court felt that § 1983 should therefore be classified as personal injury actions for limitation purposes as the "federal interest in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that the Congress favored this simple approach." *Id.* at 266. The borrowing of local statutes cannot discriminate against the civil rights remedy. *Id.*

A state's "tolling rules (govern) federal actions brought under 42 U.S.C.S. § 1981 (42 U.S.C.S. § 1981) except when inconsistent with the federal policy underlying the causes of action under consideration." *Board of Regents v. Tomanio,* 446 U.S. 478, 64 L.Ed.2d 440, 448, 100 S.Ct. 1990 (1980). Although the need for national uniformity has not been held to warrant the displacement of state statute of limitations for civil rights actions . . . uniformity within each state is entirely consistent with the borrowing principle contained in § 1988. *Wilson v. Garcia,* 471 U.S. 261, 85 L.Ed.2d 254, 266, 107 S.Ct. 1938 (1985). Dictum suggest that when a federal court borrows a state statute of limitation it should borrow any applicable provision along with the tolling provision. *Id.* at 105 S.Ct. at 1943 nt. 17.

Here, the portion of SDCL 15-2-22(3) which specifically excludes civil rights causes of action from the tolling provisions afforded to other similarly situated Plaintiffs who bring personal injury actions must fall inasmuch as the special civil rights exclusion is, amongst other things, inconsistent with federal law and policy, promotes intrastate differences, unconstitutionally discriminates against

and is hostile to federal causes of action, undervalues the constitutional values at stake in § 1983 actions inasmuch as the limitation period and tolling provisions for all personal injury actions created by state statute would be much longer if tolling provisions applied.

In *Republic Pictures Corporation v. Kappler,* 151 F.2d 543 (8th Cir. 1945), aff'd per curiam without opinion, 327 U.S. 757 (1946) Plaintiff's contract claim was governed by either a five or ten year state statute of limitations. However, merely because the Plaintiff asserted his contract claim pursuant to a federal statute of limitations he was subjected to a six month statute of limitations. The Eighth Circuit Court refused to apply the Iowa statute which subjected the Plaintiff to a much shorter statute of limitations. The Eighth Circuit stated:

> A state may not discriminate against rights accruing under federal laws. *McKnett v. St. Louis & S.F.R. Co.,* 292 U.S. 230 [(1934)]; *Pufahl v. Estate of Parks,* 299 U.S. 217 [(1936)] . . .
>
> . . . [Plaintiff's] claim or cause of action is discriminated against solely because it arises under a federal state. This discriminatory treatment . . . in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme . . .
>
> Here, that state has singled out federal claims . . . as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other federal laws. The statute violated Article 6 of the Constitution . . . (and) would result in denying to those seeking to assert such claims, the equal protection of the law, 14th Amendment, Constitution, Sec. 1. . . . 151 F.2d at 546-47.

SDCL 15-2-22 is analogous to the Iowa statute as it prescribes a shorter limitation period than those governing analogous state law claims when a claim is asserted pursuant to a federal statute.

Virginia had a statutory scheme whereby its two year statute of limitations for personal injuries was amended by adding a paragraph which singled out and subjected 42 U.S.C.S. § 1983 claims to a one year limitation period. Virginia's special statute of limitations for § 1983 actions was struck down and the two year personal injury statute of limitations was deemed to govern all § 1983 causes of action. The Court ruled that "a state limitation period which evidences hostility or discrimination toward a federal cause of action will not be adopted by federal court. . . . The discrimination toward federal rights in the (special § 1983 provision) is apparent: analogous, torts arising under state law were not similarly limited; nor was an attempt made to rationally prescribe a limitation period for § 1983 suit in terms of the object of litigation." *Edgerton v. Puckett,* 391 F.Supp. 463, 465 (D. VA 1975).

Subsequently, in *Johnson v. Davis,* 582 F.2d 1316 (4th Cir. 1978), it was held that Virginia's special one year statute of limitations for civil rights actions could not apply, rather Virginia's two year personal injury statute of limitations applied to § 1983 claims. The *Johnson* Court reasoned that to uphold a special one year civil rights action statute of limitation would "disregard the constitutional values to be protected by those actions and would condone an unreasonable discrimination between the assertion of federally protected rights and rights protected under Virginia law." *Id.* at 1317. The Court reasoned that it could not adopt a special limitation period for

1983 actions, "because to do so would be to undervalue the constitutional values at stake in § 1983 actions without rationally prescribing a limitation period for those actions in light of the object of litigation as required by Virginia law . . . (that adopting the special one year period) . . . would be to impose an unreasonably discriminatory limitation period on the assertion of important federally protected rights . . . (and) . . . constitutional tort remedies which were intended to be available where state tort remedies, although available in theory, were not available in practice." *Id.* at 1319. Additionally, there was "no rational basis for distinguishing between § 1983 and actions for injuries in light of the purposes for which statutes of limitations are generally prescribed . . . (inasmuch as) . . . the facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for §1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." *Id.*

In *Matthewman v. Akahane,* 574 F.Supp. 1510 (D. HI 1983), the Court held that Hawaii's one-year statute of limitations for actions brought for recoveries authorized by federal statute although not an unauthorized act or per se unreasonable or suspect, was nonetheless unconstitutionally discriminatory against and hostile to federal causes of action, inasmuch as limitation periods for nearly all actions created by state statute would be longer. Thus, the statute fell. *Edgerton, Johnson* and *Matthewman* are analogous to the case at bar as § 1983 claims were singled out from the statutory limitation scheme and given shorter times then state personal injury actions to bring on a law-

suit. Here, failure to afford Mr. Hughes the same tolling provision afforded a personal injury case shortened the period to bring his suit from seven (7) years, the time tolled for personal injury cases, to two years which was South Dakota's preamend civil rights statute of limitations. This resulted in Mr. Hughes' Complaint purportedly not being filed in a timely manner. Although *Matthewman* was decided prior to the *Wilson* decision, it noted that "state limitation periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 1516 ft.nt. 5. The Plaintiff in *Matthewman* argued that it was not the one year period per se which was being attacked but the fact that it was shorter than the statute of limitations for all other state claims. *Id.* at 1515. This is exactly Mr. Hughes' position. "The notion that a state should not discriminate against or express hostility to federal causes of action is a theme that is consistently repeated by the U.S. Supreme Court, albeit mostly in dicta. See, *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230, 234, 78 L.Ed. 1227, 1229, 54 S.Ct. 690, 692 (1934); *Miles v Illinois C.R. Co.*, 315 U.S. 698, 704, 86 L.Ed. 1129, 1134, 62 S.Ct. 827, 830, 146 A.L.R. 1104 (1942); *Pufahl v Parks*, 299 U.S. 217, 227, 81 L.Ed. 133, 139-140, 57 S.Ct. 151, 157 (1936). See also, *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-597, 37 L.Ed.2d 187, 93 S.Ct. 2389, 2398-2399, (1973). (State statute which is plainly hostile to the interests of the United States would not be borrowed). SDCL 15-2-22 special civil rights exclusion is plainly hostile to the interest of the United States. *Id.* at 1516.

"The law seems to be clear, therefore, that a state may not discriminate against federal causes of action in

favor of state claims of 'equal dignity and like character'. When this occurs the state statute may be struck down as unconstitutional." *Id.* at 1519. Mr. Hughes merely wants to be afforded the same limitation and tolling provisions as prisoners similarly situated when they bring on an analogous state claim.

South Dakota's attempt to forbid the application of its personal injury tolling provisions to § 1983 causes which effectively shortens the limitation period is inconsistent with federal policy as it clearly discriminates against those who are attempting to vindicate their civil rights and circumvents the federal policy interest in insuring the uniformity. Clearly, abolishing the tolling provisions, as they apply to an individual incarcerated for a term less than life when he brings a civil rights action on, creates a special class of individuals, i.e. prisoners, who must bring federal causes of action sooner than others. Minors or mentally ill individuals can invoke the tolling provisions if they file a § 1983 claim even if the same facts and testimony were produced by a prisoner bringing a § 1983 claim. There is no rational basis for this inasmuch as the facts, evidence and witnesses to be called to testify in both a personal injury suit and a 1983 causes of action are, in all probability, equal.

The Appellant argues that the rule which tolls the statute of limitations for imprisonment stems from the outdated common law doctrine that a convicted felon was civiliter mortuus (civilly dead) thus Mr. Hughes should not be afforded the tolling provision because he had access to the Court. This argument must fail. Although statutes which provide that a state prisoner is deemed to be under a legal disability and therefore can toll the running of

the statutes are "hopelessly archaic in an era when the ready access of prisoners to the courts, state and federal, is constitutionally guaranteed", *Bailey v. Faulkner,* 465 Fed.2d 102, 103 (7th Cir. 1985), South Dakota's legislature has nonetheless maintained it for those who bring personal injury actions. SDCL 15-2-22(3). Thus, if one is to apply the legislature's tolling provisions to all persons who bring personal injury actions in state court it must also apply the same to all those persons who bring federal causes of action based on the same underlying state theme in order to have intrastate uniformity. This is especially true since generally, the same evidence is presented in a § 1983 action as is presented in a personal injury case.

Additionally, a South Dakota prisoner is not deemed "civilly dead" as he must in any event bring a lawsuit within eight (8) years even if he will be imprisoned for another fifty years. Finally this Court in *Board of Regents v. Tomanio,* 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1490 (1980) has held that federal courts are to borrow a state's tolling provisions. Counsel respectfully submits that it cannot be reasonably inferred from the *Board of Regents* opinion that application of a state's tolling provisions should be completely barred if, and only if, a plaintiff prisoner brings a § 1983 action.

In *Acoff v. Abston,* 462 F.2d 1543 (11th Cir. 1985), a lawsuit was brought against the city approximately one year after the alleged injury. The city moved for summary judgment based upon a statute which provided: " . . . Claims for damages (against the city) growing out of torts shall be presented within six months from the

accrual thereof or shall be barred." The Court denied the Motion for Summary Judgment as it held per *Wilson* "federal law governs the characterization of Section 1983 claims for statute of limitation purposes and that all Section 1983 claims should be characterized as tort claims for recovery of damages for personal injury. Hence, the applicable statute of limitations in each state should be one generally applicable to claims for personal injury. The federal policy of intra-state uniformity among different 1983 claims, relied upon by the Court in *Wilson* would prevent federal courts from using a different statute of limitations in Section 1983 claims depending on whether a municipality was named as a defendant. This Court cannot, therefore, borrow the (statute) as the most appropriate and analogous state statute." *Id.* at 1546. The *Acoff* Court also noted that a statute of limitation which shortens a time for suing a municipality in relation to other defendants might violate the policies underlying the remedy provided in § 1983. *Id.* at ft.nt. 3 1547. Here, we have the flip side. Rather than limiting the time when certain defendants may be sued under § 1983, South Dakota's statutory scheme limits the time in which certain Plaintiffs, i.e. prisoners, may bring a § 1983 action.

—o—

CONCLUSION

The statute in question is unique to South Dakota and is clearly inconsistent with federal policy and law, unconstitutionally discriminates against and is hostile to federal causes of action, undervalues the constitutional

values at stake in § 1983 claims and does not promote intrastate uniformity, therefore appellee asks that this appeal be dismissed.

Repectfully submitted,

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